No. 82.

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JAMES H. McKENNEY,
Clerk.

Payson & Evarts for Appellee

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Nov. 23, 1901.

No. 82.

OTTO GROECK and JENNIE L. MERRILL and LEN HERRIFORD, Executrix and Executor of C. S. Merrill, deceased,

Appellants,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief on Behalf of the Appellee.

L. R. PAYSON,
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Of Counsel for the Appellee.

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BRIEF ON BEHALF OF THE APPELLLEE.

Statement.

By an act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," and approved July 27th, 1866

(14 U. S. Stat., p. 292), the Southern Pacific Railroad Company was authorized to construct a line of railroad connecting with the Atlantic and Pacific Railroad, formed under the same act of Congress, at such point near the boundary line of the State of California, as it should deem most suitable for a railroad line to San Francisco. To aid in the construction of the proposed line of railroad a grant of land was given to the Southern Pacific Railroad Company along the line of its railroad in the State of California of ten alternate sections of land per mile on each side of the railroad, whenever the United States had full title thereto not granted, sold, reserved, occupied by homestead settlers or otherwise appropriated, and when said land was free from pre-emption, or other claims or rights at the time the line of route was designated by a plat thereof, filed in the office of the Commissioner of the General Land Office. By the terms of the grant it was also provided that in case any of such ten alternate sections or parts of sections should have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of at the time the line of route was designated, other lands should be selected by the railroad company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers of not more than ten miles beyond the limits of the first ten alternate sections.

On December 27, 1866, the railroad company duly accepted the land grant and the terms and conditions of

the said act of Congress of July 27, 1866, and filed such acceptance in the office of the Secretary of the Interior (Record, p. 60).

Thereafter and on the 3d day of January, 1867, the railroad company filed a map of the general route of the entire railroad it was authorized to construct under said act of Congress in the office of the Commissioner of the General Land Office, and on that day the Secretary of the Interior and the said commissioner duly accepted and approved the said map and the general route shown thereon (Record, p. 60).

The Southern Pacific Railroad Company began the building of its railroad in the State of California in 1870 and completed the construction of that portion thereof extending from San Francisco to the Needles by way of Mojave in 1888. The last section, extending from Huron westerly to Alcalde, was built during that year, and the entire railroad was constructed upon the line shown on the map of general route filed January 3, 1867 (Record, p. 61).

The east one-half of southwest one-quarter of Section 19, in Township 8 south, Range 1 east, Mount Diablo meridian, containing eighty acres, was a tract of land within the place limits of the grant to the Southern Pacific Railroad Company, and was at the time of said grant otherwise disposed of, and in lieu of said eighty acres the railroad company was at all times entitled to select eighty acres of land within the indemnity limits of its grant (Record, p. 62).

The eighty acres of land involved in this case are located in the south one-half of southeast one-quarter of Section 17, in Township 24 south, Range 17 east, Mount Diablo meridian. They are distant more than twenty miles from, but lie within thirty miles of, the road shown on the map of general route filed by the railroad company on January 3, 1867, and are distant more than twenty miles from, but lie within thirty miles of, the line of the railroad as definitely located and constructed, and are opposite to and coterminous with the section of railroad extending from Huron westerly to Alcalde, the map of which section was accepted and approved by the President of the United States on November 8, 1889 (Record, p. 62).

On the 2d of September, 1885, the defendant Otto Groeck settled upon the land just described, and on September 7, 1885, filed his pre-emption declaratory statement for the land in the United States Land Office, and thereafter applied to the Register of said Land Office to make final proof under the pre-emption laws of the United State, and on June 7, 1886, he was permitted to and did make proof in said Land Office that he was a qualified pre-emptor at the time he settled upon said land. Thereafter, and on April 11, 1890, a patent in due form of law was issued by the United States to the defendant Groeck conveying the said land to him in pursuance of his pre-emption entry thereon (Record, pp. 63 and 64).

On the 13th day of July, 1891, the Southern Pacific Railroad Company duly selected the land in question

in lieu of the eighty acres heretofore referred to within the place limits of its grant, which had been previously disposed of by the United States, at the time of the filing of its map of definite location on January 3, 1867. This selection was made in proper form, and in all respects as required by the instructions issued by the Secretary of the Interior, and under the direction of the Secretary of the Interior (Record, p. 64).

After its selection of the land in controversy, and on or about the 6th day of July, 1896, the Southern Pacific Railroad Company filed its amended bill of complaint in the United States Circuit Court for the Southern District of Cailfornia, praying that it might be declared that it was the lawful owner of the land in controversy, and that the defendants held the legal title thereto in trust for it (Record, p. 4). The answer to the amended bill of complaint was filed on August 1, 1898 (Record, p. 34), and on the 31st day of May, 1899, a final decree was entered in the suit granting the prayer of the bill and directing the defendants to execute a deed granting and conveying to the Southern Pacific Railroad Company the lands described in the complaint (Record, p. 41).

From this final decree an appeal was taken by the defendants to the United States Circuit Court of Appeals for the Ninth Circuit, and on the 7th day of May, 1900, the judgment and decree of the United States Circuit Court for the Southern District of California was affirmed (Record, p. 85).

From the judgment of the Circuit Court of Appeals affirming the decree below this appeal has been taken.

THE CASE OF HEWITT VS. SCHULTZ, 180 U. S., 139.

Before proceeding to the argument of the case at bar it may be well to consider the late decision of Hewitt vs. Schultz, 180 U. S., 139. Counsel for the appellants will perhaps claim that this case tends to sustain their position. As we understand it, however, its facts would seem to preclude it from having any real bearing upon the question now before the Court.

The Hewitt case was an action in ejectment brought to recover the possession of certain land situated *outside of the forty-mile limit, but within the fifty-mile limit*, of the grant to the Northern Pacific under the Act of July 2, 1864. That is to say, the land in the Hewitt suit was not within the land which was withdrawn by the sixth section of the Northern Pacific Act and exempted thereby from sale, entry or pre-emption, except by the railroad company, but was expressly declared by said section to be subject to the operation of the pre-emption laws. The plaintiff Hewitt claimed to be the owner in fee by virtue of a patent issued to him by the United States. The defendant asserted title to the land as a purchaser from the Northern Pacific Railroad Company, which claimed to own it by virtue of the Northern Pacific Act. In the trial court the plaintiff was successful, but on appeal

to the Supreme Court of North Dakota the judgment was reversed. The case was then brought to this Court by writ of error under Section 709 of the United States Revised Statutes, upon the ground that the judgment of the North Dakota Court denied to Hewitt rights and privileges specially set up and claimed by him under the Laws of the United States.

The question before the Court, as stated by Mr. Justice HARLAN at page 141, was as follows:

> " It may be here observed that the controlling " question in this case is whether it was compe- " tent for the Secretary of the Interior upon receiv- " ing and approving the map of the definite loca- " tion of the road, to make the above order of " withdrawal in respect to the odd-numbered sec- " tions of land within the indemnity limits—*that* " *is, of lands between the forty-mile and fifty-mile* " *limits.*"

Mr. Justice HARLAN at page 145 again formulated the case presented as follows:

> " Did Congress intend by that act [Northern Pa- " cific act], to declare that when the rail- " road company indicated its line of defi- " nite location the odd-numbered sections *outside* " *of the forty-mile limit and within the fifty-mile* " *limit*, on each side of such line, along the whole " of the line thus located, should not be subject " to the pre-emption and homestead laws until it

" was finally ascertained whether the railroad
" company was entitled by reason of the loss of
" lands within the place or granted limits to go
" into the indemnity limits in order to obain lands
" to meet such loss."

The very same question had arisen in the Interior Department in the case of Northern Pacific Railroad Company v. Guilford Miller, 7 L. D., 100, in which Secretary Vilas held that the Northern Pacific Act forbade the Land Department to withdraw from the operation of the Pre-emption and Homestead Laws any lands *outside of the forty-mile limits of the grant and inside the fifty-mile limit.* The decision of this Court in the Hewitt case followed the decision of Secretary Vilas in the Guilford Miller case solely upon the ground of *stare decisis.* The syllabus of the Hewitt case is as follows:

" that the question could not be said to be free
" from doubt, but that it was the settled doctrine
" of the Court that, in case of ambiguity, the Ju-
" dicial Department will lean in favor of a con-
" struction given to a statute by the Department
" charged with the execution of such statute, and,
" if such construction be acted upon for a number
" of years, will look with disfavor upon any sud-
" den change, whereby parties who have con-
" tracted with the Government upon the faith of
" such construction may be prejudiced."

The inference from this language is that, if it had been a case of first impression, with no construction of the statute by the Land Department, this Court would have come to a contrary conclusion. At all events, we take it that the Hewitt case is an authority only in cases in which the facts are substantially the same, and will not be necessarily followed by this Court in any case in which the facts are so radically different as they are in the case at bar.

The important circumstances which distinguish this case completely from the Hewitt case are that the land in controversy here is within the indemnity limits of the grant to a railroad passing through a State, and within the statutory withdrawal of the forty-mile strip under the sixth section of the Act of July, 1866, while the land in the Hewitt case fell within the indemnity limits of the grant within a Territory, and was beyond the forty-mile statutory withdrawal and not withdrawn from sale by the sixth section of the Northern Pacific Act, but was expressly declared to be still subject to the operation of the pre-emption laws. The importance of this difference is at once obvious, when it is remembered that by the sixth section of the Atlantic and Pacific Act, as well as by the sixth section of the Northern Pacific Act, all the land of the railroad within forty miles thereof was withdrawn from sale, entry or pre-emption, except by the railroad company, and that therefore the question of the right of the Secretary of the Interior to withdraw the eighty acres here in controversy from the operation of the

Pre-emption and Homestead Laws, which was the only question in the Guilford Miller and the Hewitt cases, is not presented in this case.

The real question now before the Court is, whether the lands of the odd-numbered sections granted to the railroad within forty miles of its line of road are open for sale, entry or pre-emption by any person other than the railroad company. So far as we know, this question is presented to the Court now for the first time in this case and the case of the Southern Pacific Railroad Company v. Isaac T. Bell, No. 20, argued and submitted herewith, and has never been passed upon by the Interior Department adversely to our contention.

FIRST POINT.

The railroad company was entitled to a patent to the land in question as soon as selection thereof had been made.

Substantially the only question in this case is: What is meant by the words "land hereby granted" found in Section 6 of the Atlantic and Pacific Act? This section is as follows:

> "And be it further enacted, that the President "of the United States shall cause the lands to be

" surveyed for forty miles in width on both sides " of the entire line of said road after the general " route shall be fixed, and as fast as may be re- " quired by the construction of said railroad ; and " the odd sections of land hereby granted shall " not be liable to sale or entry or pre-emption be- " fore or after they are surveyed, except by said " company, as provided in this act ; but the provis- " ions of the act of September, eighteen hundred " and forty-one, granting pre-emption rights, " and the acts amendatory thereof, and of " the act entitled ' An act to secure homesteads to " ' actual settlers on the public domain,' approved " May 20, 1862, shall be, and the same are hereby, " extended to all other lands on the line of said " road when surveyed, excepting those hereby " granted to said company" (14 U. S., Stat., pp. 292, 296).

It is to be noticed that the first sentence of this section relates to the lands for forty miles in width on both sides of the railroad. The purpose of the section was to enact certain provisions in regard to this strip of forty miles, and it would seem but natural that the balance of the section should relate to the same lands mentioned in its first sentence, and when the words " land hereby granted " are thereafter used in this section a proper construction thereof would seem to warrant the insertion of the words contained in the first sentence, viz. : " for forty miles in width on

both sides of the entire line," so that the second sentence of the section would read as follows:

> " And the odd-sections of land for forty miles
> " in width on both sides of the entire line hereby
> " granted shall not be liable to sale or entry."

The same insertion in the last line of the section would also seem to be in accord with the intention of Congress. In other words, the entire section relates to the lands within forty miles in width on both sides of the railroad, and, when in the section the words " hereby granted " are used, it is as a qualification of and with reference to the land to which the section relates—viz., the land within forty miles on both sides of the line of the road—so that there should be inserted in the last line of the section the words of the first sentence, so as to read as follows:

> " excepting those for forty miles in width on both
> " sides of the entire line of said road hereby
> " granted to said company."

It may very well be that Congress had in mind the sparsely settled condition of the country within the Territories, and, when it had under consideration Section 6 of the Atlantic and Pacific Act, determined that it was only necessary for the interest of the railroad company to withdraw the land within the place limits of the grant when the road passed through a Territory, for the reason that there would be very few losses

within the place limits in a Territory to be made good to the railroad company out of the indemnity limits, and that for that reason it was hardly worth while to withdraw the land within such indemnity limits from sale to and pre-emption by the general public during all of the time of the building of the railroad. In other words, Congress may have been of the opinion that very little of the land within the indemnity limits of the road as it passed through the Territories would be needed to make good the losses within the place limits, and that it was therefore unnecessary to withdraw such land from sale and entry. At the same time it was very obvious that the land (whether within indemnity or place limits) along the line of that part of the road which ran through a State would probably be largely otherwise disposed of prior to the filing of the map of general route, and that very likely the entire grant of lands within the indemnity limits would be required by the railroad company in order to make good the losses within its place limits. For that reason it seemed best to Congress to create a statutory withdrawal of such land. This was accomplished by Section 6 of the Atlantic and Pacific Act, which withdrew from sale, entry or pre-emption the odd sections of land granted to the railroad within forty miles of its line. In other words, when the railroad passed through a Territory the lands within its place limits were alone withdrawn from sale, and the lands within its indemnity limits were left subject to the operation of the pre-emption laws. When the railroad passed

through a State the land within the indemnity limits was withdrawn from sale or pre-emption, as well as the land within the place limits, for the reason that it would all be undoubtedly required to make good the deficiencies within the place limits.

We know of no decision contrary to the construction of the sixth section of this act, which is above suggested.

In the case of Hewitt vs. Shultz the construction placed upon the act by the Court is in no way opposed to the views now expressed by us. At page 147 it was said :

> " It is contended that, construing the third and " sixth sections together, it is clear that the words " ' the odd sections of land hereby granted,' in " the first part, and the words ' excepting those " ' hereby granted to said company,' in the latter " part of the sixth section, refer to the lands de- " scribed in the first section of the act ; that is, to " the odd-numbered sections in the place limits " which were free from pre-emption or other claims " or rights, and had not been appropriated by the " United States prior to the definite location of " the road ; that as ' to all other lands on the line " ' of the said road when surveyed,' the act ex- " pressly declares that the provisions of the pre- " emption act of 1841, and the acts amendatory " thereof, and of the homestead act of 1862, " should extend to them ; that Congress took

" pains to declare that it did not exclude from
" the operation of those statutes any lands except
" those granted to the company in the place
" limits of the road, which were unappropriated
" when the line of the railroad was fixed; and
" that, if at the time such line was definitely fixed
" it appeared that any of the lands granted—that
" is, lands in the place limits—had been sold,
" granted, or otherwise appropriated, *then, but not*
" *before, the company was entitled to go into the*
" *indemnity limits beyond the forty-mile and with-*
" *in the fifty-mile line;* and under the direction of
" the Secretary of the Interior, and not otherwise,
" select odd-numbered sections to the extent
" necessary to supply the loss in the place limits.
" It is also contended that the object of the refer-
" ence in the sixth section of the Northern Pacific
" act to the pre-emption and homestead acts could
" only have been to bring the odd-numbered
" sections in the indemnity limits within the
" operations of those acts."

It is seen from reading the paragraph just quoted from the Hewitt case that the attention of the Court was directed entirely to the question of the lands granted to the railroad within a Territory, and that the whole decision rested upon that fact. There was no intention upon the part of the Court to construe this section with regard to the grant of lands to the railroad within a

State, and the decision, as it seems to us, was really in accord with our proposition, that the statutory withdrawal applied only to the lands which were granted within forty miles of each side of the railroad, and not to the lands without the forty-mile limit and within the fifty-mile limit.

In the case of St. Paul and Pacific Railroad Company vs. Northern Pacific Railroad Company, 139 U. S., 1–9, it was said by Mr. Justice FIELD:

> "The right of the plaintiff, the Northern Pacific "Railroad Company, to the lands in place along "the line of its route, as definitely located in the "*State* of Minnesota, and to other lands to make "up deficiencies within those limits, caused by "previous grants, sales, reservations, settlements "or pre-emptions to be taken from the indemnity "limits, or *within the forty-mile withdrawal*, will "not admit of serious doubt, unless a prior right "attached to those lands by an earlier grant of "the United States."

The question then decided by the Court would seem to be the same as that presented in the case at bar; and it was there held, that the indemnity lands as well as the place lands along the line of the railroad, when it passed through the *State* of Minnesota were withdrawn by section six from sale, entry or pre-emption, unless some prior right attached to those lands. That is to say, no right could be subsequently given to these

indemnity lands by the United States, which would affect the grant and statutory withdrawal under the provisions of section six of the Northern Pacific Act.

Further on, in the opinion in the St. Paul case, it was said by the Court at p. 17:

> "Besides the withdrawal made by the Secre-
> "tary of the Interior of lands within the forty
> "mile limit on the the 13th of August 1870, pre-
> "served the lands for the benefit of the Northern
> "Pacific Railroad from the operation of any
> "subsequent grants to other companies not
> "specifically declared to cover the premises. The
> "Northern Pacific act directed that the President
> "should cause the lands to be surveyed forty miles
> "in width on both sides of the entire line of the
> "road, after the general route should be fixed, and
> "as fast as might be required by the con-
> "struction of the road, and provided that the
> "odd sections of land granted should not be
> "liable to sale, entry or pre-emption before or
> "after they were surveyed, except by the com-
> "pany. They were, therefore, excepted by that
> "legislation from grants, independently of
> "the withdrawal by the Secretary of the Interior.
> "His action in formally announcing their with-
> "drawal was only giving publicity to what the
> "law itself declared. The object of the with-
> "drawal was to preserve the land unencumbered
> "until the completion and acceptance of the road.

" * * * After such withdrawal no interest in
" the lands granted can be acquired against the
" rights of the company, except by special legisla-
" tive declaration, nor, indeed, in the absence of its
" announcement after the general route is fixed."

It will, we think, be conceded that the purpose of this land grant was to give to the railroad company the full amount of land within its place limits. In order to accomplish this, it seemed wise to Congress to withdraw all the odd-numbered sections of land granted to the company within forty miles of the road from sale, entry or pre-emption. This would preserve the indemnity as well as the place lands within the more thickly settled states from the operation of the Pre-emption Laws, but would not preclude settlers from pre-empting lands within the indemnity limits of the grants to the railroad when it passed through a Territory. No withdrawal of the indemnity lands in a Territory seemed necessary to Congress, because of the small deficiency likely to occur within the place limits, and because such small deficiency would probably be easily made good out of the indemnity limits, even if settlers were permitted to take up lands within such indemnity limits.

To put the matter in another form, the Atlantic and Pacific Act primarily related to a railroad which was expected to pass through Territories as well as States. Congress, therefore, enacted that a strip of forty miles

along the entire length of the road, whether passing through a Territory or a State, should be surveyed and withdrawn from the operation of the pre-emption laws. Then, in order to prevent any misunderstanding and mistake, it further provided that such withdrawal from the operation of the pre-emption laws did not apply to the lands beyond this forty-mile strip, for the obvious reasons which we have just stated.

It is difficult to see how any other purpose in the passage of this act can be attributed to Congress. If it had not been its intention to withdraw from sale and pre-emption the indemnity lands along the line of the road when it passed through a State, why did it not simply require that a strip of 20 miles should be surveyed along each side of the road passing through a State instead of requiring the same width to be surveyed in a State as in a Territory? Why should Congress have permitted this great expense of a 40-mile survey instead of a 20-mile survey, unless there was some reason for it?

There was no statutory survey and withdrawal enacted by Congress of lands in the Territories between the forty and fifty mile limits, and on the contrary the 6th section as we have understood it expressly provided that such lands should be subject to the operation of the pre-emption laws. Now, if there had been any intention that the lands within the forty-mile strip should also be open to sale and entry, why did Congress direct them to be surveyed?

In other words, Congress by directing a survey of all lands within forty miles of the road and declaring that the odd sections within such limits should not be liable to sale, entry or pre-emption, except by the railroad, did not contemplate drawing the fine distinction that only place lands were thus withdrawn from sale, but evidently intended that such withdrawal should cover all lands within the forty-mile limit, to which the act in any way related. What Congress had in mind was the forty-mile strip along the entire line of the road, and it is inconceivable that it should have intended to make a distinction between the lands in this strip, when it passed through a State or through a Territory, without saying so in so many words. It would have been so easy and so natural for Congress to say so, if it had been its intention to limit the withdrawal to the odd sections within twenty miles of the road, when it passed through a State, that it is difficult to believe that such a construction can be put upon this act in the absence of any definite words to that effect. That is to say, in a doubtful case such construction should be given to an Act of Congress as would tend to sustain a grant by Congress. At least, where there is any doubt as to the meaning of a law, that construction which would deprive the railroad of land given to it under the Act of 1866 should not be preferred to a construction which would sustain the gift of the Government.

We know of no case in this court in which the words "land hereby granted" has ever been defined, but,

in the lower courts, it has been up for consideration more than once, and Mr. Justice BREWER, when Circuit Court Judge, has twice decided that the words "land hereby granted" were in no way limited in their meaning to lands within the place limits of a railroad grant, but included lands within the indemnity limits as well.

Northern Pacific R. Co. vs. United States, 36 Fed. Rep., 282-287.

Barney vs. Winona & St. P. R. Co., 24 Fed. Rep., 889.

An independent examination of this question without regard to any authority can but result in the conclusion that the words "land hereby granted" have as much application to land within the indemnity limits of a railroad grant as to lands within the place limits.

The meaning of the words "land hereby granted" is perhaps as well ascertained by asking how and in what way and under what act the railroad could acquire its title to the indemnity lands, unless it was by the Atlantic and Pacific Act. If such lands are not granted to the railroad by the Act of July, 1866, then how does it derive its right thereto. The source of the title to the land within the indemnity limits is, we think, necessarily the same as the source of the title to the land within the place limits. The only difference is as to the manner in which the title is acquired. The land within the place limits is acquired by and at the time of filing a map of general route. The title to the land within the indemnity limits is acquired by selection.

The procedure is different in the two cases, but the source of title is the same, viz.: the Act of July, 1866.

It is of considerable interest that the Interior Department has construed the phrase "land hereby granted" as including land within the indemnity limits as well as land within the place limits of a railroad grant, and in the case of Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 9 L. D., 465-468, Secretary Noble said:

> "But it is urged that by the use of the expres-
> "sion 'grant of lands' Congress meant really
> "granted lands, or lands within the primary limits
> "of the grant. I cannot concur in this view. The
> "history of the legislation of Congress will doubt-
> "less show many instances wherein *indemnity*
> "and lands other than place lands are referred to
> "as *granted* lands. One or two instances suggest
> "themselves to me, and may be briefly referred to.
>
> "By the ninth section of the Texas Pacific act
> "(16 St., 576) it is provided that, if in the too
> "near approach of said railroad to the Mexican
> "border the number of sections to which the
> "company is entitled cannot be selected on the
> "line of the road, then a like quantity of land
> "may be selected elsewhere, 'provided that no
> "'public lands are *hereby granted* within the State
> "'of California further than twenty miles on each
> "'side of said road, except to make up deficiencies
> "'as aforesaid.'

"Here *indemnity lands* to be selected for other "lost indemnity lands are included in the category "of lands 'hereby granted.' Also in the case of "the Burlington and Missouri River grant, the "only one of quantity without lateral limits now "recalled, and where the land is to be obtained "by *selection* anywhere along the line of the road, "the language of the act is, that (Sec. 19, Act July "2, 1864, 13 St., 356) 'there be and hereby is "'*granted*,' provided the company accept '*this* "'*grant*' within one year, when the Secretary "'shall *withdraw* the lands embraced in *this grant* "'from market.' And the Supreme Court in 98 "U. S., 334, construing the act, speak of it all the "way through as a '*grant*,' and of the lands as "'*granted lands*,' and uphold the right of the "company to select them anywhere along the "general direction of the road within lines per- "pendicular to it at each end. * * *

"So in 24 Fed. Rep., page 892, Barney vs. "Winona, it was held that the expression 'lands "'which may have been *granted* to the Territory "'or State of Minnesota,' includes *all lands*, the "title to which had passed to the Territory or "State of Minnesota, whether these lands were "lands in place or *indemnity* lands, and the word "*granted* has the broad, rather than the narrow "signification.

"So in the St. Paul vs. Winona Railroad, 112 "U. S., 730, referring to the significant fact that

" both acts there quoted speak of additional sec-
" ' tions to be *selected*, a word wholly inapplicable
" ' to lands in place,' the Court says, ' we think,
" ' therefore, that these *additional lands granted*
" ' to the appellant * * * are lands to be
" ' selected,' etc.

" These citations, doubtless, might be multi-
" plied largely, but they are sufficient, inasmuch as
" they show that the expressions ' *lands granted*,'
" ' *granted lands*,' ' *lands within the grant*,' and
" similar expressions, have not such narrow
" and technical meaning as to restrict the use of
" them to lands in place, or within the primary
" limits of a grant. On the contrary, such expres-
" sions are to be construed liberally and broadly,
" not standing alone, but in connection with the
" whole context of the act, and its true meaning
" gathered therefrom. Therefore, on a full con-
" sideration of the subject, I am of the opinion
" that when Congress spoke of the failure of the
" Commissioner of the General Land Office to
" ' have the lands withdrawn from market ' em-
" ' braced in the grant of lands,' etc., it meant
" the lands in both the primary and indemnity
" limits."

We refer to this decision of the Secretary of the Interior as of some importance because of the ruling in Hewitt vs. Schultz, 180 U. S., 139, where it was held that the decisions of the Interior Department were to be

followed in any question of doubt. The Interior Department has construed the words "land hereby granted" as including land within the indemity limits as well as land within the place limits, and its ruling is therefore entitled to consideration by this Court in determining the construction to be put upon these words.

As we read the case of Wood vs. Beach, 156 U. S., 548, this Court substantially defines these words as they were construed by Secretary Noble. Mr. Justice BREWER, at page 551, in speaking of the plaintiff in the case, said :

> "He deliberately took the chances of the rail-
> "way company's *grant* being satisfied out of
> "lands within the place limits or by selections of
> "lands within the indemnity limits other than
> "this, and trusted that in such event this tract
> "would be restored to the public domain and he
> "gain some advantage by reason of being already
> "on the land."

As this case is to be argued with the case of Southern Pacific Railroad Company v. Bell, No. 20, it does not seem necessary to repeat what we have said in the brief in that case, to which we respectfully refer the Court.

SECOND POINT.

There was no laches on the part of the railroad in making the selection of the land in controversy.

We have never quite understood the force of this contention of laches on the part of the railroad. The eighty acres in question were opposite to and coterminous with the line of road between Huron and Alcalde. A map of the definite location of this section of the railroad was filed with and approved by the Secretary of the Interior on April 2, 1889, and the president accepted and approved the Commissioner's report on November 8, 1889. Something over a year and a half after the approval of this section of the railroad, and on July 13, 1891, the appellant selected the eighty acres in question. The railroad company was first in a position to make a selection of the land in controversy in November, 1889. It made such selection in July, 1891. It is not plain how a delay of a year and a half in the exercise of such an important right can be considered laches on the part of the railroad.

It seems to us that this entire question of laches is completely disposed of by the decision in this case of the Circuit Court of Appeals for the Ninth Circuit, which does not appear in this record, but which will be found in 87 Fed. Rep., 970, where it was said at page 974:

"The laches is said to consist in the long delay "of the railroad company in constructing the "road and selecting the indemnity lands. We are "unable to perceive how that delay has conferred "rights upon the pre-emption settler, or how it "now affords him ground to impute inequity to "the company. The company owed no duty to "any intended settler upon the public domain. "The United States did not offer this land to "Groeck, nor did it invite his occupancy or entry. "He was a trespasser on the premises. His pre-"emption entry was not only void, but it was "unlawful. Neither such an entry nor the pay-"ment of the purchase price nor the issuance of "the patent could place him in a position to "plead laches, as against the title asserted by "the railroad company. Said the court in Wood "vs. Beach:

'It is clear that Mr. Wood acquired no equitable rights by his occupation and settlement. He went upon lands which were not open to homestead or pre-emption entry, and cannot make his unauthorized entry the foundation of an equitable title.'

"The appellees cite and rely upon the cases of "Railroad Company v. Herring, 110 U. S., 27, 3 "Sup. Ct., 485, and Galliher v. Cadwell, 145 U. S., "368, 12 Sup. Ct., 873.

"In the first of these cases the grant to the rail-"road company provided for the withdrawal when

" a map definitely showing the line of road " should be filed. The map was not filed until " three years and a half after the passage of the " act. During this period homestead and pre- " emption entries were made. The Court held " that no obligation rested upon the government " to withdraw the lands from sale until the grantee " filed a map in the general land office, definitely " showing the entire line of its road, and that in " the meantime the lands were open to pre-emp- " tion and homestead entry. It is readily seen " that the facts in that case clearly distinguish it " from the case at bar. In Galliher vs. Cadwell, " it was said by the Court:

" ' Laches is not, like limitation, a mere matter " ' of time, but principally a question of the in- " ' equity of permitting the claim to be enforced— " ' an inequity founded upon some change in the " ' condition or relation of the property or the " ' parties.'

" There are no facts in the present case to " which that language was applicable. The appel- " lant and Groeck were not in the attitude of per- " sons to whom the land in controversy was offered " upon equal terms, giving to the first entryman " the prior right. It was offered only to the rail- " road company. The facts stated in the bill and " in the plea are insufficient to show that the com- " pany has in any respect dealt inequitably with " Groeck. This is not a case in which it has

" delayed enforcing its rights to the detriment of
" another. The delay in constructing the road
" and in selecting the lieu lands has
" worked no wrong to Groeck. So
" long as the United States made no
" complaint of the delay, no equity was created
" thereby in favor of any intending settler. And
" no such settler could take it upon himself to say
" that the grantee had forfeited any of the rights
" specified in the grant. The Company was not
" required to give Groeck notice of its rights in
" the premises. He was bound to take note of the
" law which itself gave him notice. In short, no
" facts exist on which laches may be imputed to
" the railroad company for any delay upon its
" part short of the statutory period of limitation
" whereby its right to obtain the relief sued for
" would be absolutely barred. The suit was
" brought within less than three years after definite
" location, which was the earliest time when selec-
" tion could have been made, in less than two
" years after the issuance of Groeck's patent, and
" within less than one year after selection was
" made."

THIRD POINT.

The judgment of the Court below should be affirmed.

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